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John Cornelius Hayes

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OBSCENITY: THE INTRACTABLE LEGAL PROBLEM

JOHN CORNELIUS HAYES *

LAST AUGUST, the editor of *The Catholic Lawyer* asked me to comment on two 1968 decisions of the United States Supreme Court, each dealing with the Federal constitutionality of local criminal laws prohibiting the dissemination *to youth* of materials obscene *for youth* though not obscene *for adults*. In the one case, a New York statute met the test of Federal constitutionality,¹ but in the other, a Dallas ordinance failed that test.²

The editor asked me about the cases because in 1962 I had published for him a survey of a decade of decisions (mostly by the United States Supreme Court) dealing with the Federal constitutionality of laws seeking to control the dissemination of obscene films and publications;³ and he knew that I had since tried to keep abreast of later developments in that constitutional area in my role as occasional legal consultant for the National Office for Decent Literature in Chicago. He probably did not know that I have also published another law review article in this area under the unintentional pseudonym of John Cornelius Levy, for which, to set the record straight, I hereby acknowledge responsibility.⁴

My comment, in summary, is that the two cases are not inconsistent, either with each other or with *Gault*;⁵ that the Dallas case, while appearing from the majority opinion to be merely a throw-back to a long line of decisions between 1952 and 1957 in which local criminal laws were held unconstitutionally vague, really sheds new light on those prior decisions, thanks largely to the dissenting opinion of Mr. Justice Harlan and to the concurring opinion of Mr. Justice Douglas, in which Mr. Justice Black joined; and that the New York case is another milestone on the road from primitivism to relative sophistication in what Mr. Justice Harlan terms this intractable constitutional legal problem.

* A.B., Georgetown University; J.D., Loyola University; Litt. D., Aquinas College, Dean and Professor of Law, Loyola University School of Law.

¹ *Ginsberg v. New York*, 390 U.S. 629 (1968).

² *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968).

³ Hayes, *Survey of A Decade of Decisions on The Law of Obscenity*, 8 CATHOLIC LAW. 93 (1962).

⁴ Levy, *A Position on the Control of Obscenity*, 51 KY. L.J. 641 (1963).

⁵ *In re Gault*, 387 U.S. 1 (1967).

The Dallas Case

I deal first with the Dallas case. By way of background, recall that, in 1952, *Burstyn*⁶ overruled the 1915 decision of *Mutual Film Corporation*⁷ by holding for the first time that films were within the protection of the First Amendment. On that basis, *Burstyn* then held that a standard for the legal control of films expressed in terms of the adjective "sacrilegious" was unconstitutionally vague. There followed a five-year sequence of decisions, both federal and state, in which adjective after adjective in local laws designed to control films (and then, later, publications as well) was shot down as unconstitutionally vague for materials within First Amendment protection. Finally, in 1957, in *Roth* and *Alberts*,⁸ the single adjective "obscene" was held, for both local and Federal criminal laws:

(a) to describe material not within First Amendment protection (because textually the unconditional wording of the First Amendment was not intended in 1791 as a literal absolute, and because functionally the obscene lacked the slightest redeeming social importance, so that its prohibition did not impair the protected social value of freedom of expression); and

(b) to have been so adequately defined and fleshed out with standards by American case law as not to be unconstitutionally vague in respect to

such relatively unprotected materials (presumably because it met the Fourteenth Amendment's substantive due process test of adequately informing all involved of the nature of the prohibited acts and materials).

I say "relatively unprotected materials". The constitutional significance of the distinction between materials protected by the First Amendment (as applied to all local governments by the due process clause of the Fourteenth Amendment) and materials protected, not by the First Amendment, but merely by the substantive due process requirements of the Fourteenth Amendment, was not very clearly delineated in *Roth*. One of the chief contributions of *Ginsberg*⁹ (commented on hereafter) is that, in my opinion, it clarifies that distinction in several respects.

If the material is within First Amendment protection so that the highly protected social value of freedom of expression is involved, then, to justify governmental control of that material, the burden of proof is on the government; and the evidence required to sustain that burden must be scientifically verifiable and not mere opinion evidence; and such evidence must prove that a "clear and present danger" exists to a social value which, under the prevailing circumstances, is of an even higher order of importance to the common good than the value of freedom of expression; and the method and degree and duration of the control involved must be limited precisely to the extent necessary to cope with that "clear

⁶ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

⁷ *Mutual Film Corp. v. Industrial Comm.*, 236 U.S. 230 (1915).

⁸ *Roth v. United States*, 354 U.S. 476 (1957); *Alberts v. California*, 354 U.S. 476 (1957).

⁹ *Ginsberg v. New York*, 390 U.S. 629 (1968).

and present danger”.

If, on the other hand, the material is not within First Amendment protection, so that the social value of freedom of expression is not involved, the burden of proof is on the objector; his evidence must prove that the government was unreasonable (irrational) either in discerning an adverse relationship between the common good and the material to be controlled, or in its selection of the method of control (either because the selected method is irrelevant to the control sought, or because the selected method represents an unreasonable “over-kill”, or because the government has formulated its control so loosely as not reasonably to apprise the persons involved as to the nature of the prohibited conduct or materials); and the counter-evidence of the government to support its reasonableness (rationality) need not be scientifically verifiable, but may be mere opinion evidence, at least when scientifically verifiable evidence either does not exist or is so inconclusive in respect to the constitutional issue being raised as to make it impossible to categorize the opinion as unreasonable (irrational).

The Dallas ordinance here involved provided for the classification of films, prior to their initial exhibition in Dallas, as “suitable” or “not suitable” for youths under sixteen years of age. But the suitability of a film for such youths did not depend solely on the standard that the film was or was not “obscene” *for such youths*; if it had, the case would have been like *Ginsberg*.¹⁰ In fact, how-

ever, under the ordinance, a film was also “not suitable” if it portrayed, among several other things, “sexual promiscuity”, a term defined neither in the ordinance¹¹ nor in any constructions given to the term either by the Dallas Board of Censors or by the Texas courts. The holding is that, as to a film within First Amendment protection because it is not obscene, the descriptive phrase “sexual promiscuity” is unconstitutionally vague; and that the vices of such vagueness are not rendered any the less objectionable by the fact that the ordinance was designed to protect children. Given the case precedents, the decision is routine. Mr. Justice Harlan alone dissented, and he solely on the basis of his own self-styled “functional” approach (which he has urged from the very beginning in *Roth*), under which, as to state and local laws, all that is required is that the law, even as to material within First Amendment protection, stopped short of being “prudishly overzealous”; on that tolerant approach, Mr. Justice Harlan thought that the concept of “sexual promiscuity” was at least as precise as the concept of “obscenity” in *Roth*.¹²

Mr. Justice Harlan’s dissent is enlightening, because it helps to make clear that the *basic* problem has seldom been with the adjectives used by the legislatures. Most of the adjectives (or descriptive phrases such as “sexual promiscuity”) were sufficiently precise to meet the Fourteenth Amendment’s substantive due process test of reasonably appraising

¹⁰ *Id.*

¹¹ A defect since remedied by an amendment.

¹² *Roth v. United States*, 354 U.S. 476 (1957).

all persons involved of the nature of the prohibited acts or materials so as reasonably to enable actors to judge for themselves whether they were or were not within the prohibited area. The real trouble with the adjectives was that they described materials within the protection of the First Amendment so that the control of those materials, no matter how reasonably described they may have been, impaired the superior social value of freedom of expression. Instead, however, of saying that, the cases castigated the adjectives as being "unconstitutionally vague". To date (except for libel), only "obscene" describes materials not within First Amendment protection and (by coincidence?) only "obscene" is not "unconstitutionally vague". Mr. Justice Harlan cannot see that "sexual promiscuity" is any more vague than "obscene", and of course it is not. But the real point is that, for the majority, "sexual promiscuity" describes materials within First Amendment protection, whereas, for Mr. Justice Harlan, it describes materials which a state may quarantine from youths under sixteen without being "prudishly overzealous".

Re-thinking *Burstyn*,¹³ is there really anything fatally vague about the adjective "sacrilegious"? The real problem with it is that it describes materials clearly within First Amendment protection because, in the free trade of ideas, "sacrilegious" materials inevitably involve ideas as to the existence of God, as to "whose God", and so on. For that same reason, despite

the dictum in *Roth*¹⁴ as to blasphemy not having been intended to be within First Amendment protection, I would expect that the adjective "blasphemous" in a criminal statute prohibiting the sale of blasphemous materials would be held "unconstitutionally vague"—not, in my opinion, because it is, but because it describes materials within First Amendment protection.

Significantly, Mr. Justice Douglas, joined by Mr. Justice Black, filed a concurring opinion. He concurred, he said, because of his position that the First Amendment is always involved in the censorship of anything. But, he added, were it not for that position, he would concur with Mr. Justice Harlan, because "sexual promiscuity" is adequately precise to meet the substantive due process requirements of the Fourteenth Amendment only. What it cannot do is meet the test of collision with the First Amendment's protection of freedom of expression.

The significance of the Dallas case, therefore, lies for me in the light which the dissenting and concurring opinions throw upon the real thrust of the majority opinion (and of the 1952-1957 cases which it follows) in finding fault with adjectives, most of which by hindsight appear quite adequate to meet the substantive due process requirements of the Fourteenth Amendment alone.

I should, I think, now outline the majority opinion in the Dallas case so as to acquaint the reader with what I now think is the misleading traditional

¹³ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

¹⁴ *Roth v. United States*, 354 U.S. 476 (1957).

treatment of the problem of the descriptive adjectives.

The Dallas ordinance¹⁵ required an exhibitor, prior to initial exhibition, to propose to a Board of Censors that a film be classified either as "suitable" or as "not suitable" for young persons under sixteen. The decision was then for the Board. The ordinance was painstaking in providing adjective due process and prompt judicial superintendence, except that it did not require the Board to give reasons for its own "not suitable" classification or even to specify upon what standard in the ordinance its classification was based. If an exhibitor shows a "not suitable" film, he may commit a misdemeanor (punishable by a fine of up to \$200) under any of several circumstances.

The ordinance defined "not suitable" as follows:¹⁶

- (1) describing or portraying brutality, criminal violence or depravity in a manner which the Board judges likely to incite or encourage crime or delinquency by youths; or
- (2) describing or portraying nudity beyond the customary limits of candor in Dallas, or describing or portraying sexual promiscuity or extra-marital or abnormal sexual relationships in a manner which the Board judges likely to incite or encourage delinquency or sexual promiscuity by youths, or as likely to appeal to the prurient interest of youths.

¹⁵ DALLAS, TEX., REV. CODE, CIV. & CRIM. ORD., ch. 46A (1960).

¹⁶ DALLAS, TEX., REV. CODE, CIV. & CRIM. ORD., ch. 46A-1(f) 1960).

It defined "likely to incite or encourage crime, delinquency or sexual promiscuity by youths" as involving, in the Board's judgment, a substantial probability that the film would create the impression in youths that such conduct is profitable, desirable, acceptable, respectable, praiseworthy, or commonly accepted.¹⁷ And it defined "likely to appeal to the prurient interest of youths" as meaning that, in the Board's judgment, the calculated or dominant effect of the film on youths was substantially to arouse their sexual desire. The ordinance further provided that, in determining that a film was "not suitable", the Board must consider the film as a whole, and must determine whether its harmful effects outweigh the artistic or educational values which the film might have for youths.¹⁸

Under this ordinance, the Board, contrary to the proposal of the exhibitor, determined that a film was "not suitable". The exhibitor refused to accept this classification, as did the distributor. The Board thereupon promptly sought an injunction against each prohibiting any showing of the film without compliance with the requirements for a "not suitable" film, on the ground that the film portrayed sexual promiscuity in a manner likely to incite sexual promiscuity by youths and likely to appeal to their prurient

¹⁷ Under *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York*, 360 U.S. 684 (1959), this standard would appear inadequate for a film within First Amendment protection because it was not obscene.

¹⁸ The latter provision appears to conflict with the decision in *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

rient interest. No attempt was made, however, to support the allegation of the likelihood of the film to appeal to the prurient interest of youths. The trial court issued the injunction, and Texas appellate courts affirmed. The United States Supreme Court reversed on the ground that the phrase "sexual promiscuity" was unconstitutionally vague.

The opinion of the United States Supreme Court runs as follows:

- (1) Since films are within First Amendment protection, precision of regulation must be the touchstone.
- (2) While it is constitutional to require that films be submitted to a licensing Board prior to their initial exhibition, this Court has firmly insisted on adequate procedural safeguards and prompt judicial superintendence.
- (3) The vice of vagueness is particularly pronounced when expression is being subjected to licensing as a form of prior restraint, because that is a process in which we cannot leave too wide a play to those administering the ordinance, especially since doing so hampers effective judicial review even when de novo, and promotes erratic administration. In addition, the First Amendment interests involved here reach beyond those of the film makers, distributors, and exhibitors and beyond those of the youths to those of adult filmgoers who will be affected by any tendency among film makers, distributors

or exhibitors to play it safe under the threat of this ordinance.

- (4) Nor is vagueness any the less objectionable simply because the ordinance does not suppress but merely requires classification; nor because the ordinance is designed to protect children. Control of expression to a child is unrelated to tolerable vagueness because the vices of lack of guidance to expressioners, to administrators, and to judicial superintendents remain the same.
- (5) In *Ginsberg*, we held that, owing to its interest in youth, a State may regulate dissemination to youth of, and youth's access to, material "harmful to minors" though not to adults. But in *Ginsberg* "harmful to minors" was statutorily defined so as specifically and narrowly to define the phrase in accord with standards which we have established for judging obscenity. Here we merely hold that any governmental regulation for youth must meet the usual requirements for narrowly drawn and reasonable standards.

The concurring opinion of Mr. Justice Douglas and the dissenting opinion of Mr. Justice Harlan have already been presented.

The New York Case

I preface my comments on *Ginsberg*¹⁹ by saying that the Federal constitutional issues involved in the legal control of

¹⁹ *Ginsberg v. New York*, 390 U.S. 629 (1968).

obscenity appear to me to classify in one of four categories:

- (1) Problems relating to the substantive definition of, and the standards for identifying, obscenity and to the justification for any legal control whatever.
- (2) Problems relating to the method of control selected by legislators (e.g., post-publication criminal prosecution; injunctive control without interim seizure of the materials; the prior restraint method of licensing of films; the use of administrative agencies to determine the applicability of standards to particular materials).
- (3) Problems relating to adjective due process involved in the selected method of control (e.g., search warrant procedures; interim seizure of materials pending judicial determination of their obscenity; adequate notice and hearing requirements to bar ex parte proceedings; the necessity for government to seek prompt judicial superintendence in an adversary proceeding; the necessity for trial by jury).
- (4) Problems relating to trial (the necessity or admissibility of expert testimony as to contemporary community standards of decency; allocation of the burden of proof) and to appellate review, whether of determinations of administrative agencies, of juries, or of lower courts sitting without a jury.

Ginsberg falls into the first category. Mr. Justice Brennan, for the Court, formulated the Federal constitutional issue presented by the case as follows: the issue is the Federal constitutionality on its face of a New York criminal statute which prohibits the sale *to minors under seventeen* of material defined in the statute as obscene *for minors under seventeen* (irrespective of whether the material would be obscene for persons seventeen or over) by adapting *to minors under seventeen* the definition and standards of obscenity developed by decisions of this Court beginning with *Roth* in 1957 (emphasis mine).

To orient the case so as to appreciate its contribution to the evolving law in the first category of problems, a review of the prior cases in this category is appropriate.

(A) The modern American constitutional definition of, and some of the amplifying standards for the identification of, obscenity were first established in 1957 in *Roth*,²⁰ which discarded as utterly inadequate the older English test as formulated in *Queen v. Hicklin*.²¹ The definition of obscene material is "material which deals with sex in a manner appealing to prurient interest". A footnote sets out the American Law Institute's Model Penal Code definition of "prurient interest" as a "shameful or

²⁰ *Roth v. United States*, 354 U.S. 476 (1957).

²¹ *Queen v. Hicklin*, [1868] L.R. 3 Q.B. 360. This English test was objectionable because it was formulated in terms of the susceptible person rather than the average person, in terms of a part only rather than of the whole, and in terms of a theme rather than of the dominant theme.

morbid interest in nudity, sex or excretion". The footnote also expresses the opinion that there is no significant difference between this judicial definition and the definition then tentatively proposed in the Model Penal Code: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest . . . and if it goes substantially beyond customary limits of candor in description or representation of such matters." The amplifying standard for identifying obscene material is whether, to the average person, applying contemporary community standards, the dominant theme of the questioned material, taken as a whole, appeals to prurient interest.

In a concurring opinion, Chief Justice Warren took the position to which he has consistently adhered: government may constitutionally punish only those persons who are plainly engaged in the commercial exploitation of the morbid and shameful craving for materials having a prurient effect. In *Ginzburg*,²² this factor of pandering, whether intrusive or welcome to the audience, was finally incorporated as a factor to be considered in the determination of the obscenity of materials.

Mr. Justice Harlan, in his opinion concurring in *Alberts* but dissenting in *Roth*, also took the position to which he has consistently adhered and to which he returned so forcefully in *Ginsberg*:²³ We must distinguish between Federal laws and State laws. Because the Fed-

eral Government has no police power as such over sexual matters, and because the Federal Government is more strictly controlled by the prohibition of the First Amendment than is any State, and because any Federal control of obscenity would necessarily involve a single standard for the whole nation (which would be tolerable only for the worst hard-core pornography), it follows that the Federal Government must be limited in the area of obscenity to the control of hard-core pornography only;²⁴ but the States need not observe the same limitation. In concurring in *Ginsberg*, Mr. Justice Harlan took the occasion to develop what, in his self-styled "functional" approach, the State limitation under the Federal Constitution should be: simply not to become "prudishly overzealous". This tolerant limitation, of course, would give the States a great deal more leeway than they now have under the Federal constitutional limitations of *Roth* and the later cases adding to the *Roth* standards for obscenity.

In dissent, Mr. Justice Douglas, joined by Mr. Justice Black, took the position to which they have consistently adhered: One must distinguish as sharply as possible between expression and antisocial conduct. Owing to the First Amendment, which covers any and every form of mere expression (except libel?), no government in this country may control *mere* expression, including obscene expression as defined by the majority. An-

²² *Ginzburg v. United States*, 383 U.S. 463 (1966).

²³ *Ginsberg v. New York*, 390 U.S. 629 (1968).

²⁴ In his concurring opinion in *Jacobellis v. Ohio*, 378 U.S. at 197 (1964), Mr. Justice Stewart agreed, but extended this limitation to State and local law as well.

antisocial conduct only is the proper area for governmental control. Occasionally, expression may be inseparably brigaded with antisocial conduct; only if, and only to the extent that, this is the case, may government control expression. Possibly, if it could be proved by scientifically verifiable evidence that a certain form of expression will be translated into overt antisocial conduct, government might be able to control that form of expression to the extent necessary to prevent the cause from producing the effect.²⁵ The dissenters, therefore, denied the validity of each of the three grounds advanced in the opinion of the Court to support the holding that obscene expression was not within First Amendment protection:²⁶ (1) Not only has the Court never so held (a point which the opinion of the Court conceded), but no form of expression except the libelous utterance in *Beau-*

*harnais*²⁷ has ever been held to be outside First Amendment protection; nor do any prior decisions support the conclusion that obscenity has always been *assumed* to be outside First Amendment protection (or, as expressed in the *Ginsberg* dissent:²⁸ I cannot interpret occasional utterances suggesting that obscenity was not protected by the First Amendment as considered expressions of the views of any particular Justices of this Court). (2) As to freedom of expression, the First Amendment is literally all-encompassing: "No law" means no law. (3) The functional ground is invalid since neither a court nor a community has any adequate basis for judging that a mere expression has no redeeming social importance, because no scientifically verifiable evidence is available to support that judgment, and no other type of evidence will suffice.

I have always had difficulty in understanding this insistence on scientifically verifiable evidence. My difficulty has been in determining whether it is intended to apply only to the control of material within First Amendment protection or equally to the control of material not within First Amendment protection. If to the latter, I have already protested the application of any such requirement to material protected solely by the substantive due process test of the Fourteenth Amendment.²⁹ The evidence alluded to in the opinion of the Court in *Roth* in

²⁵ This hint appears again as a possible negative inference in *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York*, 360 U.S. 684 (1959). In that case, the Court held that, with respect to a film which was not obscene and which was therefore within First Amendment protection, the mere advocacy of the idea that adultery (a crime under State law), under certain circumstances, was socially acceptable and approved conduct for a married person, without any effort in the manner of presentation of that idea to incite anyone to commit adultery, could not constitutionally be suppressed by government. The negative inference that an incitatorial manner of presentation of that idea might constitutionally be suppressed is, of course, subject to the usual infirmity of negative inferences, and no reference is made as to the type of evidence which would be required to demonstrate the incitatorial character of the material.

²⁶ *Roth v. United States*, 354 U.S. 476, 485 et seq. (1957).

²⁷ *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

²⁸ *Ginsberg v. New York*, 390 U.S. 629, 654 n.4 (1968).

²⁹ *Levy, A Position on the Control of Obscenity*, 51 Ky. L.J. 641, 646-48 (1963).

support of the conclusion that obscene expression, as there defined, has always been regarded as wholly lacking any redeeming social importance was the opinion evidence of the Federal and State legislatures as manifested in their enactment of anti-obscenity criminal statutes to express the public policy of their respective jurisdictions and, incidentally, as re-manifested in their uniform re-enactment of such statutes after their existing statutes had been fatally flawed by the constitutional requirement of scienter in *Smith v. California*.³⁰ The dissenters rejected this evidence, not, as I now understand it, because they denied the probative force of opinion evidence, but simply because opinion evidence was inadequate for the task presented; only scientifically verifiable evidence would suffice. The opinion of the Court in *Roth* appeared to concede that the opinion evidence would be inadequate to support a "clear and present danger" exception for material within First Amendment protection, but thought that it was adequate to support control of material protected solely by the substantive due process requirements of the Fourteenth Amendment. My difficulty has now been cleared up by the dissenters themselves in their dissenting opinion in *Ginsberg*.³¹ While continuing to insist that all expression as such (except libel?) is within First Amendment protection (for which reason they dissent), they state that, if the governmental control were to be tested solely by the substantive due

³⁰ *Smith v. California*, 361 U.S. 147 (1959).

³¹ *Ginsberg v. New York*, 390 U.S. 629, 650 (1968) (dissenting opinion of Justices Douglas and Black).

process requirements of the Fourteenth Amendment alone, they would have no difficulty in sustaining its constitutionality under prior decisions because *many persons* think that obscene publications have a harmful effect on the young, for which reason the New York Legislature can not be deemed wholly irrational in enacting the control. Hence, they accept the opinion evidence of "modern Comstockians" as adequate to support the judgment of the New York Legislature under the substantive due process test of the Fourteenth Amendment, at least in the absence of scientifically verifiable counter-evidence which conclusively establishes the fallacy of the opinion.

(B) Subsequent United States Supreme Court cases both added to and refined the standards to be used in identifying the obscene:

(1) In 1959, *Smith*³² added, as a requirement for the Federal constitutionality of a State criminal statute, the element of scienter, *i.e.*, the statute must require, as an essential element of the crime of possessing or dealing in obscene materials, that the accused know, or be reasonably chargeable with having known, the nature of the contents of the material. Some ramifications of this requirement still remain undecided. It is not yet entirely clear that anything less than actual knowledge will suffice. And several jurisdictions have created rebuttable presumptions as to the existence of the required knowledge, the Federal constitutionality of which presumptions has not yet been tested.

³² *Smith v. California*, 361 U.S. 147 (1959).

(2) In 1962, *Manual Enterprises*³³ extended the requirement of scienter to Federal non-criminal law (a postal regulation). The case involved magazines intended for male homosexuals. The Court held that, especially when the factor of dominant prurient appeal was limited to a particular group in the community, the constitutionality of federal control of the distributor, by means of postal regulations which banned the use of the mails for distribution of the magazines to *everybody*, required that the magazines be patently offensive to contemporary community standards of decency (which they were not), i.e., that the indecency of the magazines for the community as a whole be self-demonstrating.³⁴ Moreover, since the control involved was a federal postal regulation, the "community" was the entire nation.

This requirement of patent offensiveness to the community as a whole has since been regarded by the Court as an additional standard for the identification of obscenity. I have never been able to understand this construct of the decision. In my view, the decision merely represents an application of the constitutional principle established by *Butler v. Michigan*.³⁵ In that case, a Michigan criminal statute prohibited the sale to *anybody* in the community of publications which were obscene *for children*; as the

Court correctly held, the statute was an "over-kill" in that it applied standards of obscenity *for children* to the control of publications for *everybody*, including adults for whom the publications might not be obscene. In *Manual Enterprises*, the federal postal regulation banned all distribution through the mails of publications which were obscene for male homosexuals in the community, but which were not shown to be obscene for the average person in the community—thus, an "over-kill." Had it been possible to identify the male homosexuals in the community, and had the ban on distribution been limited in distribution to them *only*, the case would have presented the interesting issue of the "target audience" adaptation of the definition of, and of the standards for the identification of, obscene publications; but since such identification of the distributees was impossible, no such issue was presented. Since, however, children *can* be reasonably identified, the possibility of banning dissemination *to children* of materials obscene *for children* presented itself, at least with respect to publications intended for children as a target audience. Moreover, this consideration suggested a further possibility of banning, for distribution to children, even publications *not* intended for children as a target audience—and so *Ginsberg*, in which such a ban was upheld as constitutional. I had already outlined this potentiality in 1963,³⁶ because such an Illinois statute,³⁷ drafted by a group of lawyer-associates of mine, had been enacted, only to be vetoed by

³³ *Manual Enterprises v. Day*, 370 U.S. 478 (1962).

³⁴ This decision had been foreshadowed by the per curiam decision in *One, Inc. v. Olesen*, 355 U.S. 371 (1958), holding that a particular homosexual magazine was not obscene. The obvious reason was that it did not appeal to the prurient interest of the average person.

³⁵ *Butler v. Michigan*, 352 U.S. 380 (1957).

³⁶ Levy, *supra* note 29, at 644-45 (1963).

³⁷ H.B. 1072, 73 Ill. Gen. Assembly (1963).

the Governor of Illinois under circumstances under which a legislative override of that veto was impossible. In my judgment, therefore, the requirement of "patent offensiveness to the community as a whole" is not an additional standard for the identification of the obscene, but merely an inherent requirement for any law which prohibits the dissemination of obscene materials to *everyone* in the relevant community.

(3) In 1964, *Jacobellis*³⁸ held that there could be no weighing of dominant prurient appeal against an element of redeeming social value so as to overbalance the latter in order to conclude that the material was obscene; if the material had *any* element of redeeming social importance, it could not be obscene. Hence, the utter lack of any redeeming social value is an independent essential element in identifying any material as obscene. In addition, even as to a State or local law, the relevant "community" must be the nation as a whole and not the State or local community, because the right protected by the Federal Constitution is necessarily a nationwide right which cannot be affected by the vagaries of a local community.³⁹ Moreover, in the application of the definition and standards of obscenity to any particular material, the United States Supreme Court must make its own independent determination unaffected by the determinations of any jury, administrative agency, or lower court.

³⁸ *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

³⁹ Chief Justice Warren in his dissenting opinion dissociated himself from this position. *Id.* at 200-01.

(4) In 1966, the Court decided three cases, each of which contributed something to the evolution of the standards for the identification of the obscene.

(a) In *Memoirs*,⁴⁰ the Court further developed its position in *Jacobellis* by holding that, where the issue was the obscenity of the material absent the circumstance of commercial exploitation, the material must be utterly without redeeming social importance as a third and independent test in addition to dominant prurient appeal and patent offensiveness to the community as a whole. *Memoirs*, therefore, represents the latest synthesis by the Court of the standards to be used for the identification of the obscene. Mr. Justice Clark and Mr. Justice White in dissent thought that this so-called third and independent standard was not really an additional standard, but merely one factor to be considered in determining the standard of the dominant prurient appeal of the material taken as a whole. I am unclear as to whether this may mean that they subscribe to the "balancing" view.

(b) In *Ginsberg*,⁴¹ the Court appears to have evolved a really new and independent standard for the identification of obscenity, by virtue of which, in order to be constitutionally controllable as obscene for the average person in the community, material need not be obscene for that average person under *all possible* circumstances. If the material is

⁴⁰ *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413 (1966).

⁴¹ *Ginsberg v. United States*, 383 U.S. 463 (1966).

being commercially exploited for its prurient appeal to the average person so that it becomes the stock in trade of the business of pandering, then, in that circumstance, the material is obscene for the average person even though, absent such circumstance, it would not be.⁴² This advertence to one circumstance attending the dissemination of the material, and not solely to the nature of the material itself, as a standard to be used in the determination of whether the material is obscene, is new.

Several of the experts in the law of obscenity with whom I have discussed the case are inclined to regard it as a freak case, explicable basically by the Court's reaction to the bold effrontery of Mr. Ginsberg in nationally advertising in advance that, under the Court's own standards of obscenity, no law could constitutionally control his publication, which would be the *creme de la creme* of erotica. But this cynical view is, of course, unacceptable.

The fact is that, from the very beginning, the Chief Justice had emphasized that, in his view, the vice to be controlled, and the only vice which government could constitutionally control, was precisely the commercial exploitation of the morbid and shameful craving for materials having a prurient effect—a craving which (though he did not say so) he may have felt was latent in the average person. Now faced with a blatant ex-

ample of that vice, the fact that the very standards by which the Court had so meticulously circumscribed and delimited controllable obscenity might make government powerless to deal with *that* vice, must have been a bit of a shock, especially when the exploiter himself had confidently predicted that result in advance in national advertising. But there was, of course, the hint in *Kingsley Pictures*⁴³ that the *manner of presentation* of an idea might be significant in determining its controllability. So the circumstance of the *manner of disseminating* an idea might be significant in determining its obscenity—might in fact tip the scales in a borderline case so that, with the circumstance of pandering, material would be obscene which, absent that circumstance, would not. In addition, that particular circumstance of pandering has a direct relevance to at least two of the three independent standards summarized in *Memoirs*⁴⁴ as necessary for the conclusion that material is obscene: it makes the material even more patently offensive to current community standards of decency than it might otherwise be; and the purveyor himself makes it clear that he has no interest in any redeeming social importance which the material might have, so that the law need then pay no more attention to this factor than he did. Hence, the holding in *Ginsberg* that, given the circumstance of pandering, material which might not otherwise be obscene becomes so.

⁴² The reason it would not be obscene might be either because its dominant theme did not appeal to the prurient interest of the average person or because it could not be said to have no redeeming social importance.

⁴³ *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York*, 360 U.S. 684 (1959).

⁴⁴ *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413 (1966).

(c) In *Mishkin*,⁴⁵ there was again the circumstance of pandering but primarily to a target audience of homosexuals and lesbians. Since the law involved banned the dissemination of "obscene" materials to *everyone* in the community and not merely to homosexuals and lesbians, the case presents a curious anti-position of *Ginsberg* against *Manual Enterprises*—of the relative significance of the circumstance of pandering, even though primarily to a target audience, against the standard of patent offensiveness to current community standards of decency, where dissemination of the materials was banned to *everybody* in the community. The circumstance of pandering prevailed, even though limited primarily to the target audience—an impressive tribute to the strength of the factor of commercial exploitation in determining the obscenity of materials for the average person in the community, although it is not as clear here as it was in *Manual Enterprises* that the material did not appeal to the prurient interest of the average person in the community. The case is not an "adapted audience" case because the New York statute made no effort to adapt the standards of obscenity to sexual deviates and then to limit the ban on dissemination to those deviates only. The case is really much more dramatic than that, because it holds that materials obscene for deviates may fall within the definition of materials obscene for the average person without any showing to that effect where the additional circumstance of pandering exists.

⁴⁵ *Mishkin v. New York*, 383 U.S. 502 (1966).

With the above review of the evolution of the standards for the identification of obscene materials, we are now in a position to appreciate the *Ginsberg* case, in which the ban on dissemination of materials obscene *for youth* (the adjusted or adaptive audience) was restricted to dissemination *to youth only* (i.e., to the very same audience to which the definition and standards of the obscene had been adapted, thus avoiding the constitutional flaw in *Butler* ⁴⁶ and, I think, in *Manual Enterprises*),⁴⁷ but in which the ban extended, not merely to materials *intended* for dissemination to youth only (the target audience factor) but to materials intended for dissemination to *everyone* in the community. I must, however, as a final piece of background, alert the reader to the fact that the opinion in *Ginsberg* treats the constitutional issue primarily in terms of the constitutionally protected freedom of the *youth*, i.e., of the *expressionee* rather than of the *expressioner*. This twist is involved owing to the fact that freedom of expression is viewed as necessarily involving both the *expressioner* and the *expressionee*. If the protected freedom of a minor-expressionee may constitutionally be more restricted than the protected freedom of an adult-expressionee, that constitutional restriction on the minor-expressionee exerts a reflex impact on the protected freedom of the *expressioner* (in this case, *Ginsberg*). Hence, Mr. *Ginsberg* has a personal stake in defending the unrestricted freedom of the minor-expressionee, and we are treat-

⁴⁶ *Butler v. Michigan*, 352 U.S. 380 (1957).

⁴⁷ *Manual Enterprises v. Day*, 370 U.S. 478 (1962).

ed to the anomaly of watching Mr. Ginsberg fight valiantly for the constitutionally protected freedom of a youth who (together with his parent) couldn't care less and actually doesn't want the freedom which Mr. Ginsberg is trying to obtain for him—a situation calculated to produce a mild schizophrenia in an unalerted reader.

In *Ginsberg*, the Court deals with a New York penal law enacted in 1965.⁴⁸ Section 1 contains the definitions of all terms used. Section 2 provides that it is unlawful for any person knowingly to sell to a minor

- (a) any visual representation which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors; or
- (b) any printed matter containing anything in paragraph (a) or containing explicit and detailed verbal descriptions or narrative accounts of sexual conduct, sexual excitement or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

Section 4 provides that violation of the statute is a misdemeanor (the maximum punishment for which is one year's imprisonment or a fine of \$500 or both).

The key phrase "harmful to minors" is defined in section 1 as follows: that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it (i) predominantly appeals to the prurient, shameful or mor-

bid interest of minors; and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and (iii) is utterly without redeeming social importance for minors.

On each of two days in October, 1965, a sixteen-year-old boy (enlisted to do so by his mother, according to Mr. Justice Fortas, so that Ginsberg could be prosecuted) picked from a display rack in Ginsberg's luncheonette store two "girlie" magazines of a type indistinguishable from magazines which the United States Supreme Court had already held not to be obscene for adults,⁴⁹ paid Ginsberg for the magazines, and walked out of the store. Charged on information, Ginsberg was tried without a jury and found guilty; the trial court found that the magazines contained pictures depicting female "nudity" (as defined in the statute), which pictures were "harmful to minors" (as defined in the statute), and that Ginsberg knowingly sold them to a minor. The conviction was affirmed by the Appellate Term of the Supreme Court, and the New York Court of Appeals denied leave to appeal. The United States Supreme Court affirmed.

The opinion of the Court is as follows:

(1) The state of the case is:

(a) Ginsberg contends solely that New York has no power, under the Federal Constitution, to adapt *to minors* the three-pronged test of obscenity as formulated in *Memoirs for everyone* because

⁴⁸ N.Y. PEN. LAW § 484-h, *as amended*, N.Y. PEN. LAW §§ 235.20-235.22.

⁴⁹ *Redrup v. New York*, 386 U.S. 767 (1967).

the constitutional protection accorded to a citizen cannot be made to depend on whether that citizen is an adult or a minor (citing *Meyer*,⁵⁰ *Pierce*,⁵¹ and *Barnette*⁵² as analogous invasions of the constitutionally protected rights of minors).

(b) New York contends that it does have such power under the Federal Constitution, because its own interest in the welfare of its children-citizens enables it to exercise its police power to bar the distribution to minors of publications, the distribution of which to adults it could not constitutionally bar. On that issue, the New York Court of Appeals has held for the State in *Bookcase, Inc. v. Broderick*⁵³: publications which are constitutionally protected for distribution to adults are not necessarily constitutionally protected for distribution to minors, because the concept of constitutionally unprotected publications may vary according to the social group to whom the publications are directed or from whom they are quarantined.

(2) We need not consider the impact of constitutional guarantees of freedom of expression upon the totality of the relationship between a minor and the State (citing *Gault*).⁵⁴ The issue here is mere-

ly whether New York may constitutionally accord to minors a more restricted freedom of expression than it must constitutionally accord to adults. We hold that it may, and that this statute does not over-exercise that power.

(3) A definition of obscenity (otherwise constitutionally unobjectionable) based on a prurient appeal to minors does not violate the constitutionally protected freedom of minors, but merely adjusts the constitutional concept of obscenity to social reality by permitting an assessment of its prurient appeal in terms of the sexual interests of minors (citing *Mishkin* and *New York's Bookcase, Inc.*).

(4) We reject any analogy to *Meyer*, *Pierce*, or *Barnette*. The applicable precedent is *Prince*⁵⁵: the power of the State to control the conduct of children reaches beyond its authority over adults, even where the crux is the invasion of constitutionally protected freedoms.

(5) In this case, there exists a supervening State interest in the regulation of expression sold to children owing to the factor of their immaturity. Hence, if it is rational for the State to find, as the New York Legislature did, that the published materials, as defined, are "harmful to minors" because they constitute "a basic factor in impairing the ethical and moral development of children and a clear and present danger to the people of the State," then two interests of the State justify its action: legal support of parents in the discharge of their primary responsibility for the welfare of their

⁵⁰ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁵¹ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁵² *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁵³ *Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71, 218 N.E.2d 668, 271 N.Y.S.2d 947 (1966).

⁵⁴ *In re Gault*, 387 U.S. 1 (1967). I take this citation to mean that *Ginsberg* and *Gault* are not at odds, because different constitutional rights of minors were involved.

⁵⁵ *Prince v. Massachusetts*, 321 U.S. 158 (1944).

children; and the State's own independent interest in the welfare of its citizen-children.

(6) Is it rational for the State so to find? It is doubtful if the legislative finding quoted above is an accepted scientific fact, but the consensus of the studies made is that the causal link is neither proved nor disproved. A clear and present danger is not required in order to justify the finding because obscenity, as adequately defined, is not within the protection of the First Amendment. Hence, the Federal Constitution requires merely that the New York Legislature not be irrational in so finding. Since the finding has not been disproved, it cannot be said to be irrational. The Fourteenth Amendment alone does not require scientifically certain criteria.

(7) There is no unconstitutional vagueness involved because the statutory definition of "harmful to minors" is virtually identical with the definition of obscenity in *Memoirs*,⁵⁶ and the New York judicial construction of "knowingly" operates to prohibit not innocent but calculated purveyance of filth to minors.

In his concurring opinion, Mr. Justice Stewart noted that the First Amendment protects freedom of expression in order to preserve a free trade in ideas, and that it protects both the freedom of the expressioner and the freedom of the expressionee in order to protect a society of free choice. But, he said, the freedom of the expressionee *assumes* a developed capacity to choose in the expres-

sionee; if that is absent, government may regulate the expressioner to prevent him from foisting his views upon a captive audience. A child is like a captive audience because he does not have a fully developed capacity for choice. Hence, the State may deprive a child of rights of which it could not deprive an adult (*e.g.*, the right to vote; the right to marry).

The dissenting opinion of Mr. Justice Douglas, in which Mr. Justice Black joined, has already been presented. Mr. Justice Fortas, in dissent, has, as I see it, just one principal point, viz., non-pandering book selling of publications which are indistinguishable from those already held non-obscene for adults should not be a hazardous occupation. Apropos of this observation, I know that something akin to this consideration was the basic reason for the veto by the Governor of Illinois of the Illinois statute enacted in 1963.⁵⁷ That statute incorporated (though not with equal precision of drafting) the same concept as the New York statute in adapting the definition of obscene to minors while also limiting the ban on dissemination to minors. The thinking behind the veto was that to compel booksellers to conform to two different standards of the obscene (the adult standard and the minor's standard) in the operation of their business would make bookselling a hazardous occupation which, in the absence of scientifically verifiable evidence of any harm to minors, was not worth the doing.

Mr. Justice Harlan, in his concurring opinion, surveyed the disagreements which

⁵⁶ A Book Named "John Cleland's *Memoirs of a Woman of Pleasure*" v. Massachusetts, 383 U.S. 413 (1966).

⁵⁷ H.B. 1072, 73 Ill. Gen. Assembly (1963).

still exist among the members of the Court as to various aspects of this intractable constitutional problem even after eleven years of reflection, and noted among the American public an utter bewilderment as to particular determinations which the Court has made. He felt that the United States Supreme Court had been reduced to mere second-guessing of state courts, and that in rare instances only was there any substantial interest in free speech at stake. His conclusion was that there could be no improvement until it is recognized that the matter of obscenity is of primarily state concern, and that the Federal Constitution tolerates much more discretion in the states than in the Federal Government, and is even more tolerant of state action in respect of juveniles. His functional solution is to limit federal regulation to hard-core pornography only, but to limit the states only when they are prudishly overzealous.

Without underestimating the significance of Mr. Justice Harlan's disquieting observations and the great practical value of his functional solution, I am nevertheless struck by what I consider a relatively rapid evolutionary case development of the substantive concept of obscenity to its present degree of sophistication. I view the notable refinement, in little more than a decade, of the standards determining obscenity as a fine example of the genius of our law. Further refinement and adjustment, of course, still lie ahead and the frustrating "grey area" of specific application will always exist, but the development of our constitutional law by the cases in all four

categories of the generic problem of controlling obscenity has been remarkable in the time involved. Equally remarkable is how much of this development was foreshadowed in the *Roth* case which began it.

In short, I get the impression that the constitutional law of obscenity has "grown up". In these two latest cases, there is even an air of urbanity in the dissent of Mr. Justice Douglas, as though he now recognizes that his view of the all-encompassing scope of the First Amendment is a lost cause over which he can finally shrug his shoulders. In reaction, perhaps, he comes very close to equating the Fourteenth Amendment's substantive due process test for the constitutional validity of a legislative finding (opinion) to the test for an insane delusion on the part of a testator in the law of wills; but I sense more of a wry humor than of bitterness in the reaction. His basic belief comes through in his gibes at the "modern Comstockians", who follow their preceptor in entertaining the opinion that the obscene publication has a harmful effect on the young, whereas the Justice doubts the wisdom of trying by law to put the fresh, evanescent, natural blooming of sex into the category of "sin." Imagine Comstock's dismay on learning that he is the preceptor of the standards for the identification of obscenity now summarized in *Memoirs*, and the preceptor for the per curiam determinations as to the non-obscenity of specific materials involved therein. As for the Justice, perhaps we may even anticipate that he will yet

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edge and experience, not only of the Church, but of all mankind, especially as available in modern disciplines, i.e., psychology, sociology, history, etc. Organic assimilation of these resources will always reflect the distinctive character of the Christian community.

(5) In all these respects, the medium of mass communication offers multiple possibilities. For this reason the process of developing new formulations of law should not only be non-secretive, and in the public domain, but should in principle receive as wide publicity as possible during the period of formulation.



OBSCENITY

(Continued)

realize that legislatures base their anti-obscenity statutes, not on the private moral standards involved in "sin", but on the public moral standards involved in the awareness (opinion) of the average man that, sin or no sin for the in-

dividual, obscenity, as adequately defined, in the long run erodes public moral values on which the common good is based.

Far from being disappointed, then, I am encouraged that the "intractable" legal problem of obscenity is showing signs of becoming tractable—another tribute to the capacity of our constitutional law for evolutionary development.

